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ABSTRACT

Contested child custody cases between divorcing parents provide a context in which particular ideologies of the family are articulated, reproduced, and legitimized in legal practices. The relationship between legal and extralegal categories was examined in a review of 32 divorce cases, 13 from family court and 19 from circuit court. Data came from court records, and direct observation and interviews with participants. Analyses involved identifying categories and properties, and comparing them to develop an understanding of their interconnections. The interrelationship between legal categories and the norms and symbols about the family expressed in these cases revealed a code for conduct on the normative level and two competing ideologies of the family on the symbolic level. Derived from substantive and procedural law, the legal categories serve to structure and limit the discourse. The extra legal categories are the norms and symbols reflected in the discourse. The code for conduct consists of two sets of interconnecting norms, which identify how to be a fit parent and how to raise children. The symbolic dimension of the code was abstracted and two ideologies of the family emerged. The gender-based ideology reflects the natural order, gives primacy to love and its expression through specific acts, and identifies an ideal representation of the mother role as the primary one. The class-based ideology reflects the rational order and emphasizes parenthood as an instrumental role to be carried out with rationality and competence. The two overlapping ideologies presently co-exist, but class-based ideology appears to be moving to a more dominant position. (JAC)

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CUSTODY LITIGATION: INTERPRETING IDEOLOGICAL DISCOURSE

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CUSTODY LITIGATION: INTERPRETING IDEOLOGICAL DISCOURSE

Introduction

Contested child custody cases between divorcing parents provide a context in which particular ideologies of the family are articulated, (re)produced, and legitimized. This paper involves the explication of the theoretical and methodological approaches used in examining this phenomenon. It is based on the analysis of empirical data from litigated cases involving the custody of children.

Since the approach which I am outlining in this paper is not in common usage among American social scientists studying the family and the legal system, I begin by briefly situating it within a larger philosophical and scientific tradition and identifying a few related approaches in sociology and anthropology.

The philosophy of science underlying this work is most closely aligned with the hermeneutics of Gadamer (1965), which is best expressed as a science of interpretation which blends the "phenomenology of Husserl, the historicism of Dilthey and the hermeneutic-existential philosophy of Heidegger" (Wolff, 1975:102). Interpretation involves the elucidation of systems of meaning and their social construction.

Within sociology this task has been undertaken in different ways by those engaged in the sociology of knowledge (e.g. Berger and Luckmann, 1966), symbolic interactionism, (e.g. Goffman, 1959), and ethnomethodology (e.g. Garfinkel, 1967). All three are concerned to some degree with the common-sense understandings of everyday life and the construction of (inter)subjectivity.

The study of systems of meaning has had a more privileged position in American anthropology, due to the centrality of the concept of culture.

Cognitive and symbolic anthropologists have tended to focus on systems of meaning in their own terms divorced from the social practices in which they are articulated. The approach presented here stems more from the interpretive theory of Clifford Geertz who states that the:

double task is to uncover the conceptual structures that inform our subjects' acts, the "said" of social discourse, and to construct a system of analysis in whose terms what is generic to those structures, what belongs to them because they are what they are, will stand out against the other determinants of human behavior (Geertz, 1973:27).

Cultural analysis of this type begins at the microscopic level; it is interpretive and not predictive. It involves constructing a reading of social discourse which is articulated within particular social practices.

My concern is with ideology¹ and its articulation within legal practices, specifically child custody cases. By ideology, I am referring to a set of symbols or imaginary representations of people's relationship to their social world. Symbols are "objects, acts, relationships, or linguistic formations that stand ambiguously for a multiplicity of meanings, evoke emotions, and impel men to action" (Cohen, 1974:23, emphasis in original). Ideologies are "actively concerned with the establishment and defense of patterns of belief and value" (Fallers, 1961:677-678).

The legal apparatus is a particular institutional site where ideologies are expressed. Sumner (1979:266) characterizes law as "a collection of ideologies, sanctioned in the correct manner by the institutionalized executors of social power, which define the socially permissible modes of social intercourse." Not all ideologies which exist in a society are present or articulated with equal force within the legal apparatus. Since the legal apparatus is an agent of social control and engaged in the management and regulation of social conflict, it is frequently the site of ideological

contestation.

The problem which guided the original research² can be stated in the following two questions: (1) What is the relationship between legal and extralegal categories in contested child custody cases which arise out of divorce proceedings? (2) In what ways does the interrelationship of the legal and extralegal categories invoked in such proceedings express an ideology of the family and formulate a code for conduct for family members? Legal categories include rules and concepts, which derive from procedural and substantive law and which serve to structure and limit the discourse. Extralegal categories refer to the norms and symbols about family and sex roles which are expressed in the discourse.

In the first section of this paper the field site and the tasks of data collection and analysis are briefly described. In the second section the legal categories, their derivation, and function are explained and illustrated. Section three focuses on the extralegal categories. First, the code for conduct is explained and outlined and then the ideologies which emerged are examined. Thus, the progression is from the location of the discourse, to the rules of the discourse, to its content, and then its meaning. It is hoped that in this way the reader can follow the connectedness of levels of analysis and interpretation.

Research Methodology

The Field Site and the Cases

The fieldwork took place in the circuit court and family court in Wiltshire County, a largely affluent suburban county in the eastern United States.³ Wiltshire County's population increased by over fifty percent from 1960 to 1970 as the nearby metropolitan area expanded. The estimated population in 1978 was slightly under 600,000.

The circuit court of Wiltshire County serves the neighboring county as

well. Ten judges are selected from Wiltshire County and two from Robbins County. Robbins County is a largely rural area far less populated and affluent than Wiltshire County. All twelve judges are nominated by a committee and appointed by the governor, after which they must be confirmed in the office during a subsequent election, for their fifteen year term.

The circuit court is the second level in the court system. The lowest tier is the district court, which hears civil cases involving up to \$5,000 and all misdemeanors as well as traffic violations. The circuit court hears civil cases involving more than \$5,000, all equity cases, such as divorce and child custody, all civil and criminal cases involving a jury, and appeals from district court or other administrative bodies.

The family court is an extension of the circuit court and is a means of alleviating the workload of the judges in domestic relations cases. The family court is presided over by commissioners who are appointed by the administrative judge to hear certain types of divorce-related cases. At least two days each week the three commissioners hear uncontested no-fault divorces. The other days are spent hearing mainly pendente lite custody and support, which means a temporary request for custody and support while litigation is pending, or modifications of custody and/or support orders. A commissioner is considered a trier of facts and he reports his findings and recommendations to a judge. The parties are given time to take exception to the commissioner's report, but generally the judge will make a court order based on the commissioner's recommendation. The family court is an attractive alternative for many people because the waiting period is usually about two months, whereas the waiting period in the circuit court is often a year or more.

The core of the data in this research consisted of thirty-two cases. Thirteen of these cases were observed originally in the family court and nineteen were observed in the circuit court. The outcomes of the hearings

were as follows: in eleven cases custody was awarded to the mother, in fourteen cases custody was awarded to the father, in four cases the siblings were split between the mother and the father, in one case joint custody was agreed upon at the last minute with the mother having custody during the school year and the father having custody during the summer. In one case the contested child was two months short of his eighteenth birthday by the time the case reached the court and judge decided that custody was a moot point, and in another case the parents reconciled after the court hearing, so no court order was issued.

Data Collection and Analysis

Fieldwork involved immersing myself in the "legal culture" of the courts for eighteen months. I carried out the traditional ethnographic tasks of gaining entrée, establishing rapport, talking with informants, observing and recording behavior, and examining records. The primary methods of data collection were the direct observation and recording of contested child custody hearings, interviews with judges, commissioners and attorneys, and the examination of legal documents and court records. Additional data came from informal talks with parents, witnesses, and attorneys while they waited in the courthouse prior to the hearing and during recesses, observations of their interactions during these times, and a concurrent year of participant observation at weekly meetings of a fathers' advocacy group. Data analysis and interpretation were begun during the period of data collection and are ongoing. The purpose of research of this nature is to interpret phenomena. Due to the rich and abundant nature of the data, they can be reanalyzed to address different issues.

The particular aspect of research which is examined in this paper derives primarily from the analysis of the legal records and transcriptions of court hearings involving the adjudication of child custody. The study of law is

conducive to a case approach and the "trouble case" method has been used extensively in the anthropology of law. The method for selecting cases was primarily to find those which involved the adjudication of the issue of custody, no matter how the case was labeled on the docket. Disputes over custody involve conflicting norms, and situational analysis was used to examine how these norms "are ultimately manipulated by individuals in particular situations to serve particular ends" (Van Velsen 1967:136). The extended case method was used to place the particular hearing in the context of the parties' ongoing legal dispute; especially in cases involving modification of custody, public records were often quite extensive, including transcripts of former proceedings, pleadings, orders, and depositions.

The analysis of the data first involved the identification of categories and properties. Constant comparison of these categories and their properties across cases served to expand and refine them and to develop an understanding of their interconnections. Collection, coding, analysis, and interpretation were ongoing and interconnected processes. Emerging interpretations led to choices of data collection which would maximize differences and possibly bring out the weaknesses of the interpretation. In this manner concepts were refined and the interpretation was deepened. Sampling was guided by theoretical sensitivity and was stopped when theoretical saturation was reached.⁴

Legal Categories

The discourse of a custody hearing is structured by legal categories, which are intrinsic to the practice of litigation. These include rules and concepts which derive from procedural and substantive law. These categories define turn-taking, who can be spoken to, by whom, when, and how. Not only do they structure what can be said, but also what cannot. The lawyers and chancellors⁵ have a shared knowledge and understanding of these categories.⁶

The complex reality of the particular family is transformed and interpreted through these categories for presentation in the courtroom.

Concepts from Substantive Law

Substantive law relating to custody derives from statutory and case law. Statutory law refers to the legal provisions developed by the legislative branch of government. Case law or stare decisis refers to precedents set by previous cases. The controlling legal concept in contested child custody cases is "the best interests of the child."

Section 402 of the Uniform Marriage and Divorce Act provides one source of statutory law in the state where the research was undertaken:

The court shall determine custody in accordance with the best interests of the child. The court shall consider all relevant factors including:

1. the wishes of the child's parent or parents as to his custody;
2. the wishes of the child as to his custodian;
3. the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interests;
4. the child's adjustment to his home, school, and community, and
5. the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child (Clark 1975:870).

Case law provides further elaboration of conditions which are relevant to the best interests of the child. The judge is responsible for considering whatever information is relevant to the issue and for determining the weight of evidence presented.

Other concepts which arise in custody hearings include "parental fitness", "maternal preference," and "equal rights". The criteria for considering a legal concept as a category for analytical purposes was based on

its appearance in the discourse. Thus, although "maternal preference" was no longer a presumption in this jurisdiction, the concept was expressly stated, usually to reaffirm its nonexistence. "Equal rights" was a concept located in the discourse, although it stems from a different area of substantive law (i.e. the Equal Rights Amendment which was adopted in this jurisdiction). "Parental fitness" was a concept seen as directly related to the "best interests of the child." Legal concepts are general, permeable, and flexible, permitting applicability to a wide variety of situations and to reinterpretation over time.

Rules from Procedural law

Evidence in custody cases needs to relate to the legal concept of "the best interests of the child." Legal categories derived from rules of evidence are manipulated by each attorney to present evidence in support of his or her case, to discredit the other side, and to prevent the other attorney from doing the same. Specific categories and instances of use are provided here to indicate how categories structure the discourse, how they are manipulated, and how they include both a legal and extralegal component. Due to page constraints only a very few examples are taken from the universe of categories which is potentially employable.

Relevance

Relevance is the first hurdle which all evidence must pass over to get on the record. To be relevant the evidence offered must assist in proving or disproving a particular proposition or issue in the case. In contested child custody cases any evidence which the chancellor believes would help in determining the ultimate issue in the case, which is the best interests of the child, would be considered relevant. The evidence must be both logically and legally relevant. Legal relevance means that the evidence is pertinent to an issue in the case. Logical relevance has to do with the way in which the

evidence relates to that issue. The following excerpt illustrates the concepts of legal and logical relevance:

mother's lawyer: (to mother) What was the conduct of your husband during the period before your separation?

father's lawyer: Objection.

chancellor: Why bring in this? It has to do with the divorce.

mother's lawyer: We are doing this to determine the fitness of the father.

chancellor: The conduct of the husband to his wife or to his children?

mother's lawyer: How it relates to the children.

chancellor: OK. Objection overruled.

The father's lawyer objected to the question. The chancellor's interpretation of the question and the objection was that the former was not legally relevant, since it related to the issue of divorce and not custody. The mother's lawyer stated that the purpose was to shed light on parental fitness, which is a legally relevant issue. Then the chancellor inquired further to determine the logical relevance of the "line of questioning," which refers to the order and logic of the attorney's questions which are directed to substantiating or disclaiming certain propositions or to undermining the credibility of the witness. Implied in his next question is the understanding that the conduct of a husband toward his wife would not be considered logically relevant to the issue of parental fitness, whereas the conduct of a father to his children would be logically relevant. The chancellor overruled the objection having satisfied both the legal and logical relevancy of the line of questioning.

It is apparent from observing the court cases that there is a wide range of behavior which is considered relevant in these cases. The category of relevancy frames what information about the family and individuals is included in and excluded from the discourse.

Hearsay

One major category of evidence is hearsay and its exceptions.

Hearsay is generally defined as any statement made outside of the immediate proceedings that is being offered in the proceedings to prove the truth of the matter asserted. The hearsay rule is that hearsay statements are not admissible in court. There are many exceptions to the hearsay rule and the attorneys manipulate these categories in order to get favorable testimony in the record.

These categories include "former testimony," "declarations against self-interest," "admissions," "past recollections recorded," "present recollections revived," "public records and vital statistics," and "spontaneous exclamations." Each category is further restricted by additional rules. Cases were examined in terms of the use of these legal categories and the type of information about family members which was admitted or excluded as a result. For example, "admissions" include any statements made by a party against his or her interests which are material to the issues in the case. In one case the father had written a "love letter" to his wife at the time of their separation, admitting his feelings of inadequacy as a husband and father, and pleading for her to stay. During the hearing her attorney entered the letter into evidence, claiming that it was an exception to the hearsay rule, since in it the father had admitted that he was "a lousy father." The chancellor quoted from the letter during his final statement as he awarded the custody of the children to the mother.

"State of mind" is used to circumvent the hearsay rule by claiming that the statement is not hearsay; thus the evidence enters "through the back door." This category is used frequently in contested child custody cases to put into the record the preferences of the children. For example: a teacher is called to the stand and begins relating a conversation she had with the

son, in which the son said that he really wants to live with his father. The mother's lawyer objects, stating that the comment is hearsay. The father's lawyer proffers that the statement is not offered for the truth of the matter asserted (that the boy wants to be with his father), but rather to indicate the emotional "state of mind" of the boy at the time of his discussion with his teacher. The chancellor overrules the objection.

Character Evidence

A major portion of testimony in contested child custody hearings falls under the category of "character evidence." A line of questioning which seeks to elicit character evidence is generally only permitted for two purposes. One is used to show the character of the party, by presenting testimony which relates to the "propensity" of that person to manifest particular "traits," "habits," or "customs." The other purpose for presenting character evidence is to discredit a witness by attacking his or her credibility.

The three methods for eliciting character evidence to show "propensity" are: (1) asking for the witness' opinion of the person as a parent or of a character trait of the parent; (2) asking about specific acts which the witness has observed and which reflect a particular character attribute of the parent; and (3) asking for the parent's reputation in the community. Each method of presenting character evidence is governed by additional rules and varies in terms of its perceived reliability and probative value.

"Specific acts" are the most frequent form of presenting character evidence and is considered highly reliable since it is based on "facts" rather than on conclusions drawn by the witness. The content of the testimony involving specific acts consists of descriptions of behavior and its (in)appropriateness. Thus, specific acts provide a source of explicitly stated norms and their breaches. The following excerpt in which the father's lawyer is questioning the father about the mother's behavior illustrates this:

father's lawyer: Did there come a time when that (the care of the children) changed?

father: Yes, at the end of the summer.

father's lawyer: What did you observe?

father: They came back from visiting her parents, and she said that our son was a discipline problem. I came to pick him up for dinner and he was wearing cut-off blue jeans and a tee-shirt. I told him to put on a suit and tie. She should have seen that he was properly dressed.

father's lawyer: Was there an occasion when you went to dinner with their mother?

father: Yes, she said that...she had met a 50 year old man...They had an affair...

father's lawyer: What else?

father: Her consumption of marijuana increased.

father's lawyer: Can you relate to us an incident having to do with her marijuana use?

father: Yes....She said that the night before she had had two really good joints and had passed out. So she had not done the wash and didn't know how the children got to bed...

father's lawyer: Can you relate another incident?

father: Once she rolled a marijuana cigarette right in front of me. I asked if she did it in front of the children. She said yes, and I told her that she shouldn't.

father's lawyer: What happened then?

father: The next night my son called me and said he was at home alone. I went over there and we sat watching tv. He said, "Look, that's mom's suitcase packed. She must be going to

sleep at her boyfriend's tonight." When she came back I said not to do that. Can't she see what she is doing to the children?

father's lawyer: Were there any other incidents with men?

father: Yes.

Impeachment can be accomplished through the same methods used in showing the character of the parties. However, impeachment techniques are used not only to discredit the parties, but also any person who is testifying as a witness in the hearing. Impeachment is a characteristic of cross-examination, since a lawyer is not generally allowed to impeach his own witnesses. The content of the cross-examination must be within the scope of the topics brought out in direct examination. Although the expressed purpose for presenting the evidence is to impeach the witness, this enables the cross-examining attorney to get testimony in the record which was not brought out in direct examination.

In the following example, the mother's lawyer had laid the groundwork for opinion testimony from a lay witness. The witness testified that she had known the mother for fifteen years and visited with her and the children regularly. He then asked for her opinion:

mother's lawyer: Is she a fit and proper person to have custody of the children?

witness: Yes. She is very fit and very proper.

mother's lawyer: What do you base this on?

witness: Personal knowledge. She has been like a foster daughter to me.

Then during cross-examination the father's attorney asked:

father's lawyer: Did you know that the witness has emotional problems?

witness: No.

father's lawyer: Did you know that she was seeing a psychiatrist?

witness: No.

father's lawyer: That's all.

The mother's lawyer sought to show in laying the groundwork that this witness was someone who knew the mother well and whose "credentials" for having an opinion were good. The father's lawyer during cross-examination asked questions which implied that the witness must not know the mother very well, which impeached the witness. The implication is that if the mother was really like a "foster daughter" to this witness, why didn't the witness know that the mother was having emotional problems and seeing a psychiatrist? She stated that her opinion was based on personal knowledge; she was impeached by showing how restricted and incomplete her knowledge was. This technique also permitted the father's lawyer to introduce the issue of emotional problems for the first time in the proceedings.

In this section I have laid out the way in which legal categories structure and limit the discourse in the courtroom. The rules of evidence found in the discourse have an existence independent of the issue of custody, since they are part of procedural law. Legal concepts derived from substantive law are put into operational form in the discourse through the rule governed and manipulated presentation of the particular family's situation.

Extralegal Categories

The Code for Conduct

The evidence which is presented in the hearings relating to the child's best interests or to parental fitness is information about how people raise children and act as parents. The questions asked by attorneys and the responses of witnesses indicate what is considered to be appropriate behavior and what are breaches of norms, (e.g. A mother is asked: Is it true that you

did not serve your children breakfast when you were living in the marital home?") Comments and questions by the chancellors during the hearing often make explicit what the behavior of a parent should be and how children should be raised (e.g. "Children should have a certain hour to get up in the morning.") From these sources a particular code for conduct was extracted. Each case did not cover all of these elements, but they appeared frequently enough to form a pattern. Outlines of the code for conduct were given to the chancellors for their comments and to provide a basis for more structured interviews. The general response was that I had "accurately captured" the phenomenon. Triangulation of this sort enabled the analysis to be strengthened and refined.

The code for conduct consists of two different and yet interconnected sets of norms. The first set relates to parents' responsibilities to their children; the second relates to the parents' fitness. Norms vary in their generality and importance, and have both normative and symbolic dimensions. The normative dimension refers to the norms as behavioral prescriptions, whereas the symbolic dimension reflects their meaning. Although these dimensions co-exist, they can be separated for analytical purposes. A skeletal outline of the code for conduct is provided in this section, which focuses on the normative aspects with some reference to the symbolic. Then in the next section the ideologies formed by the symbolic aspects are examined.

How to Raise Children

Raising children involves the successful fulfillment of three major types of parental duties: 1.) meeting the children's basic needs, 2.) supervising the children, and 3.) providing a home for the children. Each of these categories is defined by its properties.

I. Meeting the child's basic needs.

A. Child is adequately to well-fed.

1. Decent home-cooked meals most of the time.
 2. Regularly scheduled meal times.
 3. Food preparation by parent or delegated to another adult.
- B. Parent cares for the child's health and cleanliness.
1. Supervision of good habits and cleanliness.
 2. Regular dental and medical check-ups.
 3. Child is generally in healthy condition.
 4. Parent cares for child when sick, or delegates responsibility to an adult.
 5. Parent administers to special health needs. (e.g. diabetes)
- C. Child has at least adequate shelter.
1. Child has a specific place which is considered home.
 2. Basic utilities such as water, heat, electricity, etc. are in order.
- D. Child is adequately to well-clothed.
1. Clothing is clean and neat.
 2. Child is appropriately attired for weather and social situation.
 3. Child has an adequate wardrobe.
- E. Child is adequately to well-schooled.
1. Child's performance in school is at least adequate.
 2. Child attends school regularly.
 3. Child has best education available under the circumstances (e.g. economic)
 4. Parent maintains an active interest in the child's education.

Performing these duties is not only considered to be meeting one's obligations as a parent, but also reflects one's love for the children. A parent should not undertake these responsibilities, because he or she has to, but because he or she wants to. Before marital separation it is generally

assumed that the mother has had the major responsibility for meeting the day to day needs of the child.

II. Supervising the children.

A. Childcare arrangements.

The following appears as the order of preference:

1. Parent cares for the child fully. (or care given by father's new wife).
2. Parent cares for the child partly.

Due to working outside the home the parent makes other arrangements for childcare, which are preferred in the following order:

- a. Cared for by grandparents.
- b. Cared for by other relative (e.g. sibling of parent)
- c. Cared for by housekeeper.
- (Option for father to have "mother figure" in the home).
- d. Cared for by babysitter.
- e. Cared for by a day care center.
- f. Cared for by home day-care.

These orders of preference reflect a symbolic division between home and work and love and money. When kin take care of a child the basis of that care is believed to be love and the place is in the home. Strangers do not love the children, instead it is a contractual arrangement done for money. This is less preferable but still acceptable. Day care centers are more closely regulated by the state than home day care. This reinforces the assumption that those who are not involved in a love relationship with the child, but rather are "doing it for money" must be watched and regulated. People who care for children as work for money may be able to provide them with minimal supervision and care, but they can not provide them with the love and

emotional sustenance which comes out of the home and which is done not for money but from the moral bond which is axiomatic between blood relatives.

B. Adequate to well-supervised.

1. Parent knows where child is at all times. (unless with other parent)
2. Parent supervises child or delegates another adult to supervise child.
3. Child is not left alone.

C. Disciplining children.

1. Discipline should be consistent and rationally administered.
(Screaming frequently or pulling hair is not considered positively).
2. Generally the following order of severity is considered appropriate depending on the age of child and the wrong the child committed:
 - a. Explaining the wrong to the child.
 - b. Taking away a privilege.
 - c. Sending the child to his/her room or grounding.
 - d. Corporal punishment.

The parent can use hand, paint stick, wooden spoon, belt, etc., but must aim for the buttocks (not back, legs, face, etc.). If using an object the hitting should not be hard enough to leave marks. A parent should not administer physical punishment in anger. Inconsistent punishment or punishing children when they did not do wrong is considered irrational. The standards of criminal child abuse are often used as a comparison.

III. Providing a home for the child.

- A. Providing a home is more than providing a house. Home symbolizes love, comfort and security and is a shelter from sorrow, distress and

fear. Parents who are divorcing have failed automatically in this task to some extent, since divorce creates a "broken home" and the children must suffer for a decision made by the parents.

B. Providing suitable living quarters.

1. The home is neat and clean.
2. The home has adequate living space. Preferable that each child should have his or her own room. If not possible then children should sleep in different room than parents and opposite sex siblings.
3. Home should be child-centered, not adult-centered.

Child should have space and furnishings which are his or her domain.

C. Providing amenities. (middle-class accoutrements of life and leisure, such as tennis lessons, summer camp, etc.) Fathers claim that they are better able to provide amenities since their earnings are higher; mothers claim that they could provide the amenities if the father paid adequate child support.

D. Providing a stable environment.

1. Children should have an established daily routine.
2. Children should not be 'bounced around'.

E. Providing a moral atmosphere in the home.

1. Moral teachings.
 - a. Parents have a duty to teach children love and respect for parents, for each other as siblings, for other adults, and for their community and country.
 - b. Parents have a duty to teach children to honor and obey their parents, other adults, and the laws of the land.
 - c. Parents need to provide their children with a moral education,

which may include an organized religion.

2. Moral behavior

Children are believed to learn more by example than by teaching.

Thus, the morality of the parent's actions are of utmost significance.

If the children are sheltered from the parent's behavior then it has little or no impact on them.

- a. Illegal activity affects the moral atmosphere since it teaches children to do what it is unlawful to do. (e.g. smoking marijuana).
- b. Sexual misconduct affects the moral atmosphere since it does not show children the appropriate way to behave as adults. Dating should be discrete and the children should be shielded from it. A mother with a boyfriend is not seen as the same as father with a girlfriend.

F. Providing a neighborhood (The home as part of the community).

1. Stability in neighborhood (child has roots in community where has grown up).
2. Relatively homogeneous neighborhood (where child fits in).
3. Peer group available (so child has playmates).
4. Play area/facilities available.

How to be a Fit Parent

Each parent must show that he or she is a "fit and proper person" to have custody of the children. Fit means both to be competent in the task and to be suited for the task. Proper implies conformity to the accepted standard of conduct. The qualities of parental fitness involve the way in which parental duties are carried out, the way in which the parent has adapted his or her life to parenting, and how well the parent conforms to the standards of appropriate behavior.

I. A parent should put the children first (as top priority).

A. Prior to separation.

1. Mothers show this by having stayed home to care for the children.
2. Fathers show this by having worked to provide for the children.

B. Indications that the parent is not putting the children first.

1. Relinquishment or abandonment

- a. A mother who leaves the home without taking the children with her has by her actions admitted that the father is able to care for the children. A man who leaves the children with their mother is not acting 'unfatherly'; but a woman who leaves the home without taking the children (leaving them with the father) is acting 'unmotherly.'
- b. Sometimes a mother will 'voluntarily relinquish' the physical custody of the children to the father if she is unable to care for them properly during the transition period when she is starting a new job, etc.

C. A parent should sacrifice his or her own needs for the needs of the children. Indications that the parent is not doing so are: (when in excess)

1. A parent spends money on him or herself instead of on children.
2. A parent spends time with friends/lovers instead of with children.
3. A parent spends time alone or admits needing time away from children.
4. A parent "ships" children off to other relatives or sitters.

It appears that the expectations of mothers in this regard (putting the children first) is higher than that of fathers. This means that mothers may easily fall short of these expectations, whereas fathers must show that they

are able to rise to a lower level of expectation. Women are expected to sacrifice for their children. Men talk of sacrificing their jobs for their children.

II. A parent should treat siblings equally.

- A. To single out a child for punishment or praise continually is not proper.
- B. If a parent does not feel the same amount of love for each child, the parent should behave as if he/she does.

III. A parent should be able to set limits.

- A. Indications that the parent is not able to do so:
 - 1. Inability to control children.
 - 2. Child allowed to get away with anything.
 - 3. Child continually acts disrespectful or obnoxious.
 - 4. Child found doing inappropriate or unlawful activities.
 - 5. Parent constantly screams and bickers.
- B. Most frequently it is the mother who is not able to set limits, since that has been the father's role in childrearing, backing up the mother's primary role as nurturer and caregiver.

IV. A parent should be in good health.

- A. Physical health
 - 1. Ulcers, nervous tics, etc. may indicate that a parent can not cope with stress.
 - 2. Certain medical conditions (intense migraines, epileptic fits, etc.) may create temporary inability to deal with children.
 - 3. A parent should be young enough to see the children to maturity.

B. Mental health (parent should be emotionally stable).

Indications that the parent may lack this characteristic:

1. A parent has sought professional help with psychological problems.
2. A parent exhibits emotions strongly and frequently; (e.g. women acting 'hysterically' or men acting violently).
3. A parent has past history of emotional instability; (military discharge for psychological reasons; institutionalization).
4. Demeanor in court is indicative

V. Emotional suitability

A. A parent should be patient, loving, attentive, caring, devoted.

With infants and young children the parent should also be gentle and tender.

B. Women are considered to be more naturally this way than men.

VI. A parent should set a good moral example for the children.

A. A parent should be law-abiding.

Illegal actions or criminal convictions are indications that this is not so.

B. A parent should use good judgment.

Good judgment is a very broad category and basically means that the person acted in a proper and appropriate way within the roles that person assumes in society.

1. If hearing takes place before or at the time of the divorce, then the way in which a parent performed his/her marital duties is often considered relevant.

- a. Dutiful spouse
- b. Kind and loving spouse
- c. Faithful spouse
- d. Chaste spouse

Different marital obligations are reflected for husbands and wives. A husband should make a living to provide for the needs of his wife and children. He should treat his wife with respect and carry himself appropriately as the head of household. A wife has the primary responsibility of taking care of the home and children, although this does not necessarily exclude working outside of the home. This includes household maintenance such as cleaning, laundry, shopping, and cooking. She should treat her husband with respect and understanding.

2. Post-divorce hearings involving the modification of custody orders reveal that the parent's conduct with others and with the ex-spouse is important.

- a. Conduct with ex-spouse (as co-parents)

Parents, particularly the custodial parent, should encourage the children to love the other parent, to look forward to seeing the other parent, etc. The custodial parent should let the other parent know when the children are sick and how they are doing in school. Neither parent should make negative remarks about the other in the presence of the children. In other words, each parent should act like a reasonable and civil person.

- b. Conduct with others (dating behavior)

A parent who is dating should be extremely discreet and shield the relationship from the children. Mothers, particularly, should be wary of making their boyfriends a big part of their life and of having them intrude. The time and attention that a woman spends on a new relationship means that the children are getting that much less. For a father, a girlfriend (assuming that it is not a fly-by-night relationship) may provide the children with the

"maternal influences" which they need.

The code for conduct outlined above presents an ideal model of the family against which the divorcing parents are measured. The code consists of norms of how to raise children and act as a fit parent. Norms define appropriate behavior of persons occupying specific roles. Father and mother are seen as complementary rather than identical roles, thus the appropriate behavior of fathers and mothers is different, although overlapping. Determining custody involves choosing who will be the parent to care for the children on a daily basis and be responsible for them, which is more closely associated with the normative role of mother in the intact family. The articulation of this in custody cases leads to different strategies and consequences for mothers and fathers.

In testifying, fathers frequently justify their lower level of past participation in childrearing by stating that they did "as much as any normal father would do." To strengthen his case a father attempts to show that the mother has not performed the role of mother adequately and/or that he has excelled beyond the normative expectations of father. Lawyers representing fathers frequently characterize their clients as unusual or abnormal in their behavior and their desire to have their children. ("A man surprisingly enough, provides the maternal and paternal care for this child....To be honest, I am very surprised when men are capable of raising little children. It's hard for me to imagine cooking, cleaning, etc. He has that committment.") However, too much deviation from the norm can work against the father. In one case the judge said that he felt that the father might have "too much love" for the children which was a "warning signal" for the future.

Since the role expectations of mothers are high, it is not difficult to find occasions when mothers have deviated from them, ("Is it true that you said to your husband that you wanted a vacation away from your children?").

Mothers' attorneys seek to show that the woman has excelled as a mother, whereas the fathers' attorneys seek to indicate how she has fallen below the ideal standards. The role of mother is portrayed at a level of primacy in the divorcing or divorced woman's life in a way which fatherhood is not for a man. Thus, a woman's performance in other roles (e.g. employee, friend) appears as detracting from or weakening her role as mother, whereas other roles for men appear frequently as either neutral or supportive of their father role.

On one level the code for conduct defines the duties and proprieties of non-gender specific parenthood. On another level it differentiates between parents on the basis of gender and judges them against normative constructs of mother and father. An examination of the symbolic dimension of the code and the ideology of the family which underlies it will further highlight this contradiction.

The Ideologies of the Family

According to Althusser (1971:153) an ideology "represents the imaginary relationship of individuals to their real conditions of existence."

Ideologies "interpellate", or address, subjects; thus, "to conceive of a text or an utterance as ideology is to focus on the way it operates in the formation and transformation of human subjectivity" (Therborn, 1980:2).

Therborn (1980:18) defines three modes of interpellation. Ideologies tell 1) what exists and what does not, including "who we are, what the world is, what nature, society, men and women are like," 2) what is good, right, just, etc. and its opposites; and 3) what is possible and impossible; what can be changed and what cannot.

The symbolic aspects of the code for conduct can be abstracted from the norms and be understood separately as ideological constructs. The symbolic dimension includes meanings of motherhood and fatherhood, of love and duty,

and of the individual and the family. The symbols derive from the cultural domains of gender, class, and kinship⁷ filtered through the domain of law. Their articulation reveals two ideologies of the family which are in competition for dominant position in the ideological discourse. In one ideology the gender/kinship aspects are predominate, whereas in the other the class/kinship aspects are predominate. Thus, although both share elements from all three domains, they also contain conflicting elements which reveal contradictions and inconsistencies.

In this section I briefly describe some of the salient features of the gender-based and class-based ideologies of the family, which emerge from the analysis and interpretation of the symbolic aspects of the code for conduct.

The Gender-based Ideology

The gender-based ideology has held a dominant position in the ideological discourse in contested child custody cases since the 1930's, but has been increasingly challenged by the class-based ideology since the 1970's. The gender-based ideology of the family privileges the "natural order" in relating what exists, what is good, and what is possible. It is a cultural construct of the nuclear family, which is brought to bare on a situation arising from divorce, and consequently throws into relief certain elements within it.

Husbands and wives are connected to one another by the natural expression of their love, which is sex; and marriage is the only proper place for its expression. Fathers and mothers are connected to their children through their shared biological substance (blood), which results from the sexual act between the spouses. The natural tie between mothers and children is somewhat stronger than that between fathers and children due to the primordial tie of pregnancy, the maternal attachment during infancy, and the mother's day to day involvement in childrearing.

Divorce ends the relationship between the husband and wife and breaks the

natural bond of sex between them. The blood tie of each with the children remains, which is irreducible and permanent.

Actions carried out by the female as mother/wife/woman are mutually reinforcing within the nuclear family and are "naturally" female. The acts of the mother/wife in the household, such as cleaning, cooking, and children are women's activities. They are done out of love and as expressions of love for her husband and children. The home symbolizes love and is the woman's domain.

The role of mother embodies a level of sacrifice and selflessness, which places it in conflict with any other role once divorce necessitates the differentiation of mother/wife/woman. Other roles and activities outside of the home indicate selfishness and a lack of sacrifice which are "unmotherly". Sexual acts outside of the marital relationship are self-gratifying animal acts and, thus, are especially contradictory to the role of mother. In one case this was made quite explicit. The therapist testified about the mother's "warm supportive" relationship with her boyfriend, which the judge later characterized as her "meeting her carnal needs." The father's sexual activities were overlooked. The identity of mother, then, takes primacy and is often in contradiction to other roles taken by women.

The actions carried out by the male as a father/husband/man are also mutually reinforcing within the nuclear family. The primary role is of provider to the wife and children, which involves earning money in the public sphere of work outside of the home. Although men are able to learn the tasks women do in the home, these do not "come naturally" and are done instrumentally rather than as expressions of love.

With divorce the identity of man takes primacy over other roles the male has, but is not in contradiction with those roles in the way that mother is for women. However, if the man is engaged in the code for conduct of a mother, he is in conflict with that role, since as a man it is axiomatic that

he can not be a mother. Thus, although the tasks associated with motherhood can be performed by him, they do not carry the same meaning, since they are not "natural."

Home/work, love/money, and female/male are complementary yet interpenetrating symbolic oppositions. Men work outside of the home for money to support the home which exists for love. Women's work is housework which is done out of love in the home. Women's acts, then are directly related to love and are supported by money, but not for money, whereas men's acts are done for money to support the place where love is provided. Men are thus connected directly with money and indirectly with love. For women the reverse is true. This creates a symbolic exchange between men and women of money and love. Women are love-givers and money-takers; men are love-takers and money-givers. Although this exchange is implicit in the ideology of the intact nuclear family, divorce disrupts the symbolic order and places the elements outside of the context in which they originally "make sense".

There are two primary ways in which this is revealed in contested child custody cases. One is the connection which is made between visitation and child support. Although there is no actual legal connection between these two aspects, they are continually presented as interrelated. On a symbolic level this relates to the exchange of love and money. For the man the divorce has severed the love relationship with the woman. She is no longer doing the acts that she did for him which represented love. Instead the love relationship which continues for him is with his children. However, the money connection between himself and the home in which his ex-wife resides still remains. Thus, money (child support) is still seen as an exchange value for love (visitation).

The connection of women with love-giving and men with love-taking has consequences for the mothers and fathers engaged in extra-marital

relationships, either during separation or subsequent to divorce. Love, first of all, is defined as a limited good within the family. Thus, if some is given to others outside of the family, family members receive less. A woman with a boyfriend is giving love to an outside member who is a love taker. Thus, the children are getting that much less. A father with a regular girlfriend is receiving love from her and thus accruing more for the children.

These are several of the more salient features of the gender-based ideology of the family. Both attorneys manipulate elements of this ideology to denigrate the other party, while building the case of their client.

The Class-based Ideology

The class-based ideology privileges the "rational order" in relating what exists, what is good, and what is possible. The unit of focus is the individual as a goal-directed actor. Equality and achievement are the cornerstones of the ideology.

The parental duties of the code for conduct are instrumental tasks to be done competently, efficiently, and rationally. The appropriate behavior of a fit parent is consistent with the rational behavior of a self-controlled individual showing good judgement.

A person is responsible for his or her own actions and has considerable control over his or her own life. In one case the chancellor told an abused wife who lost custody of the children to her husband, "You have no one to blame but yourself," referring to her irrational, erratic behavior.

Striving toward goals even if they are not successfully reached is important. In one case, for example, the father explained how he had "tried to make a go of it" under difficult circumstances. Until his testimony the chancellor was seriously considering putting the children in a foster home rather than award them to either parent, since the children's circumstances were very much wanting. Instead the chancellor stated that the father

"deserved" to be able to keep them, because it was clear that he had tried and was trying to care for them. In another case the father was characterized by two expert witnesses as not able to give the children what they needed emotionally, whereas the chancellor saw him in a positive light, because he was "a gung-ho type," willing to do anything for his children.

In addition problem-solving and seeking expertise are important characteristics. Parents should be able to work out solutions for themselves, but when they cannot, they should seek out the appropriate expert. In a way this ideology is better able to cover the situation of contesting custody itself. The parents are looking toward the state as the expert to assist them in a problem they could not resolve on their own. They both hire the appropriate experts (attorneys) to help them work hard on their cases with the goal of "winning" custody.

Neither the gender-based nor the class-based ideologies exist in isolation. All cases involve interwoven aspects of both ideologies and chancellors, attorneys, and parents articulate elements of both. A synthesis of the two which reflects their interconnection with one another is as follows: Marriage is like a business partnership. When the partners want to split they have to decide who gets what and what happens with the ongoing business they have. Raising children is the ongoing business which remains after a husband and wife end their marriage partnership. A decision needs to be made on whom the responsibility falls. They ask the state, a hidden partner in their marriage, to make that decision. The state has an interest in seeing that the job is done correctly. The parents appear before the chancellor, who is an equal opportunity employer when it comes to the job of raising children. The chancellor looks at how they handled the job in the past and how they intend to do it if they retain it. He listens to how they handled other jobs. He keeps in mind that the applicants are not important;

the crucial factor is furthering the best interests of the child, and his job is to figure out who is the better person to handle that job.

The two people before the chancellor have an equal right to be there, but they are not the same. They are individuals with different strengths and weaknesses. One is male/husband/father; the other female/wife/mother. The female is more naturally adapted to the task, but then has she shown that she has put her natural capacities to the best use? The man is not so naturally qualified for the task, but has he learned how to do it and can he do it adequately? Who will put this job as the top priority and carry it out competently?

The way in which the two ideologies articulate with one another reflects the possible receding of the gender-based ideology and the ascendancy of the class-based ideology toward a more dominant position in the discourse. Although they overlap they are clearly in contestation with one another for primary control in custody litigation over definitions of parenthood, family, love, and duty.

Summary and Conclusions

In this paper I have attempted to describe the levels of analysis and methodological approaches used to interpret ideologies which are articulated within the legal discourse of contested child custody cases. First, the legal categories were isolated and defined. Deriving from substantive and procedural law, the legal categories serve to structure and limit the discourse. Then I defined the extralegal categories, which are the norms and symbols reflected in the discourse. The code for conduct consists of two sets of interconnecting norms, which identify how to be a fit parent and how to raise children. The symbolic dimension of the code was abstracted and two ideologies of the family emerged. The gender-based ideology reflects the natural order, gives primacy to love and its expression through specific acts,

and identifies an ideal representation of the mother role as the primary one. The class-based ideology reflects the rational order and emphasizes parenthood as an instrumental role to be carried out with rationality and competence. Presently the two overlapping ideologies co-exist, although it appears the class-based ideology is moving from a residual to a more dominant position in the discourse.

There are several questions which remain unaddressed in this paper, but which I intend to address in a longer treatise. First of all, how do the ideologies articulated within legal practices function as elements of social control? How does the model of the family produced within the code for conduct serve to explain the failure of the divorcing family and leave the ideology itself intact. What is the relationship between the ideologies articulated here and their articulation in other sites within the society? What is the relationship between the ideological field of struggle and the real social changes occurring within the society? What are the ramifications of the possible ideological shift on families, the legal system, and society?

Notes

¹For a complete review of the concept of ideology, see Larrain, 1979.

²The research was funded by a National Research Service Award from the National Institute of Mental Health and a doctoral dissertation award from The American University in Washington, D.C.

³In observance of the guidelines established for the protection of human subjects for this research, the actual site of the fieldwork cannot be disclosed. The names used here are fictitious.

⁴For further explanation, see Glaser and Strauss, 1967.

⁵I am using "chancellor" to refer to judges and commissioners.

⁶In order to facilitate my understanding of the language of the "natives" I was studying, I enrolled in courses on Civil Procedure, Evidence, and Family Law at the Washington College of Law. After the research was completed an initial draft of a chapter on legal categories was given to a law professor specializing in evidence for comment and critique. This provided a "check" on my understanding and interpretation of the legal rules and concepts.

⁷The symbols described here are very similar and in some respects identical to the cultural construct of the family described by Schneider (1968) and Schneider and Smith (1973). Since these works examine the symbolic system of the family abstracted from any social practice, the conflicts between the elements derived from the domains of gender and class remain dormant.

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